

SENATE BILL NO. 31

INTRODUCED BY J. ESP

BY REQUEST OF THE CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING CONTINUED CUSTODY OF A CHILD BY THE CHILD'S CARETAKER RELATIVE FOLLOWING VOLUNTARY SURRENDER OF THE CHILD BY A PARENT OF THE CHILD UNDER CIRCUMSTANCES INDICATING ABANDONMENT; PROVIDING FOR AN EX PARTE ORDER BY A DISTRICT COURT; PROHIBITING A PEACE OFFICER OR COURT FROM REQUIRING SURRENDER OF THE CHILD BY THE CARETAKER RELATIVE EXCEPT IN CERTAIN CIRCUMSTANCES; PROVIDING IMMUNITY; AND PROVIDING AN APPLICABILITY DATE."

~~WHEREAS, THE LEGISLATURE RECOGNIZES THAT THE RIGHT OF PARENTS TO THE CUSTODY AND CONTROL OF THEIR CHILDREN IS BASED UPON THE LIBERTIES SECURED BY THE UNITED STATES AND MONTANA CONSTITUTIONS AND THAT A PARENT'S RIGHT TO THAT CUSTODY AND CONTROL IS THEREFORE NORMALLY SUPREME TO THE INTERESTS OF OTHER PERSONS; AND~~

~~WHEREAS, THE LEGISLATURE ALSO RECOGNIZES A GROWING PHENOMENON IN WHICH ABSENT OR OTHERWISE UNAVAILABLE PARENTS HAVE TEMPORARILY SURRENDERED THE CUSTODY AND CARE OF A CHILD TO A GRANDPARENT OR OTHER CARETAKER RELATIVE FOR A LENGTHY PERIOD OF TIME; AND~~

~~WHEREAS, THE LEGISLATURE FINDS THAT A CARETAKER RELATIVE FREQUENTLY OFFERS A CHILD A LOVING, STABLE, AND SECURE ENVIRONMENT IN WHICH TO LIVE, MAKE FRIENDS, AND ATTEND SCHOOL, WHICH IS AN ENVIRONMENT NOT PROVIDED BY A PARENT WHO TEMPORARILY ABANDONS A CHILD; AND~~

~~WHEREAS, A CHILD IS DEPRIVED OF THAT CARING AND SAFE ENVIRONMENT WHEN A PARENT RETURNS TO CLAIM THE CHILD WITH LITTLE OR NO NOTICE TO THE CARETAKER RELATIVE; AND~~

~~WHEREAS, THIS SITUATION, WHICH IN SOME INSTANCES HAS OCCURRED MULTIPLE TIMES WITH THE SAME CHILD, IS DISRUPTIVE TO THE MORE STABLE LIFE OFFERED BY THE CARETAKER RELATIVE AND MAY VIOLATE THE CHILD'S RIGHTS ENSURED BY ARTICLE II, SECTION 15, OF THE MONTANA CONSTITUTION, SUCH AS THE RIGHT UNDER ARTICLE II, SECTION 3, OF THE MONTANA CONSTITUTION OF SEEKING SAFETY, HEALTH, AND HAPPINESS; AND~~

~~WHEREAS, FOR THESE REASONS, IT IS THE PURPOSE OF [THIS ACT] TO EXERCISE THE LEGISLATURE'S POLICE POWERS FOR THE HEALTH AND WELFARE OF CHILDREN WHO HAVE BEEN ABANDONED BY THEIR PARENTS TO THE CARE OF RELATIVES AND TO CREATE A PROCEDURE, APPLICABLE IN LIMITED SITUATIONS CAUSED BY THE VOLUNTARY SURRENDER~~



1 ~~OF A CHILD BY A PARENT, UNDER CIRCUMSTANCES INDICATING ABANDONMENT, WHEREBY A CHILD IN THE CARE OF A~~  
 2 ~~RELATIVE MAY REMAIN WITH THAT RELATIVE WHILE THE ISSUE OF ABANDONMENT BY THE PARENT IS REVIEWED AND~~  
 3 ~~DETERMINED BY A COURT OF LAW; AND~~

4 ~~———— WHEREAS, THE LEGISLATURE BELIEVES THAT THIS TEMPORARY INFRINGEMENT ON THE RIGHT OF A PARENT TO~~  
 5 ~~THE CUSTODY AND CONTROL OF A MINOR CHILD IS JUSTIFIED BY THE POSSIBILITY OF ABANDONMENT BY THE PARENT,~~  
 6 ~~BECAUSE THE WELFARE OF THE CHILD IS AT STAKE, AND BECAUSE OF THE LIKELY VIOLATION OF THE CHILD'S RIGHTS~~  
 7 ~~ENSURED BY ARTICLE II, SECTION 15, OF THE MONTANA CONSTITUTION;~~

8

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10

11 ~~———— NEW SECTION. **Section 1. Legislative finding and purpose -- definitions.** (1) The legislature~~  
 12 ~~recognizes that the right of parents to the custody and control of their children is based upon the liberties secured~~  
 13 ~~by the United States and Montana constitutions and that a parent's right to that custody and control is therefore~~  
 14 ~~normally supreme to the interests of other persons. The legislature also recognizes a growing phenomenon in~~  
 15 ~~which absent or otherwise unavailable parents have temporarily surrendered the custody and care of a child to~~  
 16 ~~a grandparent or other caretaker relative for a lengthy period of time. The legislature finds that a caretaker relative~~  
 17 ~~frequently offers a child a loving, stable, and secure environment in which to live, make friends, and attend school,~~  
 18 ~~which is an environment not provided by a parent who temporarily abandons a child. However, a child is deprived~~  
 19 ~~of that caring and safe environment when a parent returns to claim the child with little or no notice to the caretaker~~  
 20 ~~relative. This situation, which in some instances has occurred multiple times with the same child, is disruptive to~~  
 21 ~~the more stable life offered by the caretaker relative and may violate the child's rights ensured by Article II, section~~  
 22 ~~15, of the Montana constitution, such as the right under Article II, section 3, of the Montana constitution of seeking~~  
 23 ~~safety, health, and happiness. For these reasons, it is the purpose of the legislature in enacting [section 2] and~~  
 24 ~~this section to exercise its police powers for the health and welfare of children who have been abandoned by their~~  
 25 ~~parents to the care of relatives and to create a procedure, applicable in limited situations caused by the voluntary~~  
 26 ~~surrender of a child by a parent, under circumstances indicating abandonment, whereby a child in the care of a~~  
 27 ~~relative may remain with that relative while the issue of abandonment by the parent is reviewed and determined~~  
 28 ~~by a court of law. The legislature believes that this temporary infringement on the right of a parent to the custody~~  
 29 ~~and control of a minor child is justified by the possibility of abandonment by the parent, because the welfare of~~  
 30 ~~the child is at stake, and because of the likely violation of the child's rights ensured by Article II, section 15, of the~~

1 ~~Montana constitution:~~

2 ~~——— (2) As used in [section 2] and this section, the following definitions apply:~~

3 ~~——— (a) "Caretaker relative" or "relative" means an individual related to a child by blood, marriage, or adoption~~  
 4 ~~by another individual, who has care and custody of a child but who is not a parent, foster parent, stepparent, or~~  
 5 ~~legal guardian of the child.~~

6 ~~——— (b) "Parent" means a biological or adoptive parent or other legal guardian of a child.~~

7

8 **NEW SECTION. SECTION 1. LEGISLATIVE FINDING AND PURPOSE -- DEFINITIONS.** (1) THE LEGISLATURE  
 9 RECOGNIZES THAT THE RIGHT OF PARENTS TO THE CUSTODY AND CONTROL OF THEIR CHILDREN IS BASED UPON THE  
 10 LIBERTIES SECURED BY THE UNITED STATES AND MONTANA CONSTITUTIONS AND THAT A PARENT'S RIGHT TO THAT  
 11 CUSTODY AND CONTROL IS THEREFORE NORMALLY SUPREME TO THE INTERESTS OF OTHER PERSONS. THE LEGISLATURE  
 12 ALSO RECOGNIZES A GROWING PHENOMENON IN WHICH ABSENT OR OTHERWISE UNAVAILABLE PARENTS HAVE  
 13 TEMPORARILY SURRENDERED THE CUSTODY AND CARE OF A CHILD TO A GRANDPARENT OR OTHER CARETAKER RELATIVE  
 14 FOR A LENGTHY PERIOD OF TIME. THE LEGISLATURE FINDS THAT A CARETAKER RELATIVE FREQUENTLY OFFERS A CHILD  
 15 A LOVING, STABLE, AND SECURE ENVIRONMENT IN WHICH TO LIVE, MAKE FRIENDS, AND ATTEND SCHOOL, WHICH IS AN  
 16 ENVIRONMENT NOT PROVIDED BY A PARENT WHO TEMPORARILY ABANDONS A CHILD. HOWEVER, A CHILD IS DEPRIVED OF  
 17 THAT CARING AND SAFE ENVIRONMENT WHEN A PARENT RETURNS TO CLAIM THE CHILD WITH LITTLE OR NO NOTICE TO THE  
 18 CARETAKER RELATIVE. THIS SITUATION, WHICH IN SOME INSTANCES HAS OCCURRED MULTIPLE TIMES WITH THE SAME  
 19 CHILD, IS DISRUPTIVE TO THE MORE STABLE LIFE OFFERED BY THE CARETAKER RELATIVE AND MAY VIOLATE THE CHILD'S  
 20 RIGHTS ENSURED BY ARTICLE II, SECTION 15, OF THE MONTANA CONSTITUTION, SUCH AS THE RIGHT UNDER ARTICLE II,  
 21 SECTION 3, OF THE MONTANA CONSTITUTION OF SEEKING SAFETY, HEALTH, AND HAPPINESS. FOR THESE REASONS, IT IS  
 22 THE PURPOSE OF THE LEGISLATURE IN ENACTING [SECTION 2] AND THIS SECTION TO EXERCISE ITS POLICE POWERS FOR  
 23 THE HEALTH AND WELFARE OF CHILDREN WHO HAVE BEEN ABANDONED BY THEIR PARENTS TO THE CARE OF RELATIVES  
 24 AND TO CREATE A PROCEDURE, APPLICABLE IN LIMITED SITUATIONS CAUSED BY THE VOLUNTARY SURRENDER OF A CHILD  
 25 BY A PARENT, UNDER CIRCUMSTANCES INDICATING ABANDONMENT, WHEREBY A CHILD IN THE CARE OF A RELATIVE MAY  
 26 REMAIN WITH THAT RELATIVE WHILE THE ISSUE OF ABANDONMENT BY THE PARENT IS REVIEWED AND DETERMINED BY A  
 27 COURT OF LAW. THE LEGISLATURE BELIEVES THAT THIS TEMPORARY INFRINGEMENT ON THE RIGHT OF A PARENT TO THE  
 28 CUSTODY AND CONTROL OF A MINOR CHILD IS JUSTIFIED BY THE POSSIBILITY OF ABANDONMENT BY THE PARENT, BECAUSE  
 29 THE WELFARE OF THE CHILD IS AT STAKE, AND BECAUSE OF THE LIKELY VIOLATION OF THE CHILD'S RIGHTS ENSURED BY  
 30 ARTICLE II, SECTION 15, OF THE MONTANA CONSTITUTION.

1 (2) AS USED IN [SECTION 2] AND THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:

2 (A) "CARETAKER RELATIVE" OR "RELATIVE" MEANS AN INDIVIDUAL RELATED TO A CHILD BY BLOOD, MARRIAGE,  
 3 OR ADOPTION BY ANOTHER INDIVIDUAL, WHO HAS CARE AND CUSTODY OF A CHILD BUT WHO IS NOT A PARENT, FOSTER  
 4 PARENT, STEPPARENT, OR LEGAL GUARDIAN OF THE CHILD.

5 (B) "PARENT" MEANS A BIOLOGICAL OR ADOPTIVE PARENT OR OTHER LEGAL GUARDIAN OF A CHILD.

6  
 7 **NEW SECTION. Section 2. Caretaker relative rights upon return of parent -- continuing custody**

8 **affidavit -- review, finding, and order by district court -- limited reconsideration -- immunity.** (1) If custody  
 9 of a child has been voluntarily given to a relative of the child by a parent of the child and the child has remained  
 10 with that relative for at least 6 months under circumstances in which it is unclear whether or when the parent will  
 11 return and retake custody of the child, the provisions of this section apply unless, during that 6-month period, the  
 12 parent expresses to the relative a firm intention and a date on which the parent will return and resume custody  
 13 of the child and subsequently adheres to that schedule.

14 (2) Upon a return of the parent and an expression by the parent of an intent by that parent to reassert  
 15 the parent's right of custody and control over the child, the caretaker relative may file, WITHOUT PAYMENT OF A  
 16 FILING FEE, with the district court in the county of the relative's residence a detailed affidavit as provided in this  
 17 section. The affidavit must contain the following matters, the exclusion of any of which makes the affidavit void:

18 (a) the identification of:

19 (i) the caretaker relative, including the relative's address;

20 (ii) the child in the custody of the relative; and

21 (iii) the parent demanding custody of the child, including the parent's address, if known;

22 (b) a statement of the facts, as nearly as can be determined, of:

23 (i) the date, time, and circumstances surrounding the voluntary surrender of the custody of the child to  
 24 the caretaker relative, including any conversation between the relative and the parent concerning the purpose  
 25 of the parent's absence and when the parent would return and resume custody of the child;

26 (ii) the reason for the surrender of the child to the relative, as far as is known by the relative;

27 (iii) the efforts made by the relative to care for the child, including:

28 (A) facts explaining the nature of the home provided by the relative for the child;

29 (B) the schooling of the child while in the relative's custody; and

30 (C) the socialization of the child with other children and adults, both inside and outside the family of the

1 caretaker relative; and

2 (iv) whether any contact was made by the child's parent with the relative, the child, or both, during the  
3 absence of the parent and if so, the date, time, and circumstances of that contact, including any conversation  
4 between the relative and the parent concerning when the parent would return and resume custody of the child;

5 (c) a statement by the caretaker relative as to why the relative wishes to maintain custody of the child;

6 (d) a warning, in at least ~~10-point~~ 14-POINT type, to the caretaker relative in the following language:  
7 "WARNING: DO NOT SIGN THE FOREGOING AFFIDAVIT IF ANY OF THE ABOVE STATEMENTS ARE  
8 INCORRECT, OR YOU WILL BE COMMITTING AN OFFENSE PUNISHABLE BY FINE, IMPRISONMENT, OR  
9 BOTH."; and

10 (e) a notarized signature of the caretaker relative following a written declaration that the affidavit is made  
11 under oath and under penalty of the laws of Montana governing the giving of false sworn testimony and that the  
12 information stated by the caretaker relative in the affidavit is true and correct.

13 (3) A copy of the affidavit filed with the district court must be provided by the caretaker relative to the  
14 child's parent, if the address or location of the parent is known to the relative, ~~to the county attorney of the county~~  
15 ~~in which the caretaker relative resides; and to the local and state offices of~~ MAY BE PROVIDED TO the department  
16 of public health and human services. A caretaker relative may maintain temporary custody of the child for 5 days  
17 following the return of the parent and the demand by the parent for custody of the child pending completion of  
18 the affidavit and the order of the district court. During that 5-day period, the caretaker relative may not be deprived  
19 of the custody of the child by a peace officer or by the order of a court unless a court finds, upon petition by the  
20 child's parent and after a hearing and upon notice to the caretaker relative as the court shall require, that:

21 (a) the child has not been in the custody of the caretaker relative for at least 6 months;

22 (b) the caretaker relative has committed child abuse or neglect with regard to the child in the custody  
23 of the relative; or

24 (c) the action by the caretaker relative to make and file the affidavit with the district court in accordance  
25 with this section was not made in good faith.

26 (4) Upon receipt of the caretaker relative's affidavit pursuant to subsection (3), the department ~~shall~~ MAY  
27 proceed pursuant to 41-3-202 as if a report of abandonment of the child had been received.

28 (5) (a) Within 48 hours of the filing of the affidavit, the district court shall review the affidavit and  
29 determine ex parte whether the affidavit contains prima facie evidence that the child was abandoned by the child's  
30 parent. If the court determines that there is prima facie evidence that the child was abandoned by the child's

1 parent, the court shall within 3 BUSINESS days of its determination of prima facie evidence enter appropriate  
 2 findings of fact concerning the abandonment and enter an ex parte order approving and ordering continued  
 3 custody and control of the child by the caretaker relative. An order of the district court pursuant to this subsection  
 4 approving and ordering continued custody by the caretaker relative is effective for 14 days following entry of the  
 5 order.

6 (b) If the court determines that the affidavit does not provide prima facie evidence of abandonment by  
 7 the parent, the court shall within 3 BUSINESS days of its determination make appropriate findings of fact and order  
 8 the child returned to the parent. Upon receipt of the written findings and order of the court, the caretaker relative  
 9 shall surrender the custody and control of the child to the child's parent.

10 (C) DURING OR AFTER THE 14-DAY PERIOD ESTABLISHED UNDER SUBSECTION (5)(A), THE CARETAKER RELATIVE  
 11 MAY COMMENCE A PARENTING PLAN PROCEEDING UNDER 40-4-211 OR PETITION THE COURT TO BE APPOINTED THE  
 12 GUARDIAN OF THE MINOR UNDER 72-5-225.

13 (6) Upon entry of an order by the district court pursuant to subsection (5)(a), ~~the clerk shall send~~ a copy  
 14 of the order MUST BE SENT to the child's parent, if the address of the parent is known, ~~to the county attorney, and~~  
 15 ~~to the local and state offices of the department of public health and human services. The department shall treat~~  
 16 ~~the order as a substantiated allegation of abandonment for the purposes of this chapter.~~

17 (7) The child's parent may, after receipt of the court's findings and order ordering continued custody of  
 18 a child by a caretaker relative ~~and only if the parent provides evidence of nonabandonment that was not~~  
 19 ~~considered by the court~~, apply to the court, upon notice to the caretaker relative as the court shall provide, for a  
 20 reconsideration of the court's order approving continued custody of the child by the relative. The court shall  
 21 reconsider its order and may reverse its order based ~~only~~ upon presentation of evidence of nonabandonment ~~that~~  
 22 ~~was not considered by the court in making its order approving the continued custody of the child by the relative.~~  
 23 Pending a reconsideration pursuant to this subsection, custody of the child must remain with the relative unless  
 24 the order of the district court approving that custody expires or a court has ordered a change of custody pursuant  
 25 to subsection (3).

26 (8) [(a)] A caretaker relative refusing to surrender custody of a child while acting in good faith and in  
 27 accordance with this section is immune from civil or criminal action brought because of that refusal.

28 [(b) A peace officer acting in good faith and taking or refusing to take custody of a child from a relative  
 29 in accordance with this section and the entity employing the officer is immune from civil or criminal action or  
 30 professional discipline brought because of the taking of or refusal to take custody of the child.]

1 ~~(9) AS USED IN THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:~~

2 ~~(A) "CARETAKER RELATIVE" OR "RELATIVE" MEANS AN INDIVIDUAL RELATED TO A CHILD BY BLOOD, MARRIAGE,~~  
3 ~~OR ADOPTION BY ANOTHER INDIVIDUAL AND WHO HAS CARE AND CUSTODY OF A CHILD BUT WHO IS NOT A PARENT, FOSTER~~  
4 ~~PARENT, STEPPARENT, OR LEGAL GUARDIAN OF THE CHILD.~~

5 ~~(B) "PARENT" MEANS A BIOLOGICAL OR ADOPTIVE PARENT OR OTHER LEGAL GUARDIAN OF A CHILD.~~

6 ~~(9) SUBJECT TO AVAILABILITY OF APPROPRIATIONS, THE ATTORNEY GENERAL SHALL PREPARE A FORM FOR THE~~  
7 ~~AFFIDAVIT PROVIDED FOR IN THIS SECTION AND SHALL DISTRIBUTE THE FORM AS THE ATTORNEY GENERAL DETERMINES~~  
8 ~~APPROPRIATE.~~

9

10 NEW SECTION. Section 3. Codification instruction. ~~[Sections 1 and 2] are [SECTION 1] IS [SECTIONS~~  
11 ~~1 AND 2] ARE~~ intended to be codified as an integral part of Title 41, ~~chapter 3 40, CHAPTER 9,~~ and the provisions  
12 of Title 41, ~~chapter 3 40, CHAPTER 9,~~ apply to ~~[sections 1 and 2] [SECTION 1] [SECTIONS 1 AND 2].~~

13

14 NEW SECTION. Section 4. Two-thirds vote required -- contingent voidness. Because [section  
15 2(8)(b) ~~1(8)(B) 2(8)(B)~~] limits governmental liability, Article II, section 18, of the Montana constitution requires a  
16 vote of two-thirds of the members of each house of the legislature for its passage. If [this act] is not approved by  
17 at least two-thirds of the members of each house of the legislature, then the bracketed language in [section 2(8)  
18 ~~1(8) 2(8)~~] is void.

19

20 NEW SECTION. Section 5. Applicability. [This act] applies to the voluntary surrender of a child by the  
21 child's parent to a caretaker relative, ~~all as defined in [section 1],~~ occurring on or after October 1, 2007.

22 - END -